Court of Appeals, State of Michigan

ORDER

Northern Warehousing Inc v State of Michigan

Docket No. 260598

LC No. 04-000239-MK

Michael R. Smolenski
Presiding Judge

Bill Schuette

Stephen L. Borrello
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The Court further orders that the motion for reconsideration is GRANTED. Upon the certification of this order, the opinion issued on March 7, 2006, has immediate effect. The appeal remains closed.

Borrello, J. would deny the motion for reconsideration.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR - 4 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

NORTHERN WAREHOUSING INC., d/b/a NORTHERN FOOD SERVICE, Plaintiff-Appellee,	UNPUBLISHED March 7, 2006
v STATE OF MICHIGAN, DEPARTMENT OF EDUCATION, Defendant-Appellant.	No. 260598 Court of Claims LC No. 04-000239-MK

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted the Court of Claims' order granting a preliminary injunction in plaintiff's favor that enjoined defendant from diverting United States Department of Agriculture (USDA) food commodities to cooperatives that certain school districts had formed. We affirm.

I. FACTS

Plaintiff is involved in the business of distributing and warehousing food for the national school lunch program for the State of Michigan and the Michigan Department of Education (MDE). Plaintiff was awarded the contract to provide storage and distribution of USDA donated commodities to eligible recipient agencies throughout the State for the MDE for the 2003 school year.[1] The contract was a one-year contract, with an option to renew for four additional years. The contract divided the State into three regions and plaintiff was awarded this contract for Regions One and Three, while another company received the contract for Region Two. Plaintiff was awarded the contract after coming in as the lowest bidder for those regions.

The contract contained the following language:

[1] Testimony indicated that the 2003 school year began July 1, 2002 and ran until June 30, 2003. The school year is indicated by the year in which it ends.

> The State of Michigan shall enter into an agreement with a Contractor(s) to provide Warehousing and Delivery Services for various region(s) . . . for the State of Michigan on behalf of the Michigan Department of Education (MDE). The contractor will be required to furnish all personnel, equipment, storage, and administrative materials and services which are necessary to receive, warehouse, allocate and distribute USDA donated food items to those recipients identified by the State. The contractor will be the primary distributor of commodities within a region, however, some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of MDE.
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> Exact quantities to be received, warehoused and distributed are unknown. . . . Quantities specified, are estimates based on prior years receipts and/or anticipated USDA shipments, and the State is not obligated to order in these or any other quantities. The Contractor shall be responsible for the services as requested according to attached requirements. The State is not obligated to request warehousing and delivery services in these amounts or any other quantities.

At a pre-bid meeting held on February 19, 2002, the State informed potential bidders that a cooperative of school districts called Great Lakes School Food Consortium (Great Lakes) had been formed to receive USDA food commodities as a pilot program. The bidders in general, and plaintiff specifically, were informed that Great Lakes had 15 school districts as members and that there may be a minor change in that number for the 2003 school year.

Plaintiff's contract with the State was extended to include the 2004 and 2005 school year. In the 2005 school year, Great Lakes had further expanded and the School Purchasing and Resource Consortium (SPARC) had also formed a cooperative of school districts to receive USDA commodities. As a result of the two cooperatives, over 200 school districts were receiving USDA commodities through the cooperatives and not from plaintiff. In the letters to plaintiff offering extensions of the contract, the State did not mention the increasing size of the cooperatives or that the pilot program Great Lakes had originally been involved in had become permanent. Additionally, MDE did not decrease the estimated number of lunches that it believed plaintiff would be providing, based on the number of school districts that were now participating in the cooperative programs, even though MDE knew that, because of the cooperatives, the number of school districts plaintiff would be delivering to would decrease.

As a result of the cooperatives, plaintiff was no longer delivering food commodities to a number of school districts. Plaintiff's general manager indicated that plaintiff's business had declined 41.55 percent because of the cooperatives. Plaintiff contended that this was especially detrimental to its business because during the bidding process for the original contract, it was informed by the State that the number of recipient agencies plaintiff would serve was going to increase by approximately 32 percent. Plaintiff further asserted that it had invested a substantial amount of money to increase its operations to handle the increased demand for its services. Plaintiff asserted that because of the loss of business to the cooperatives, it was suffering from financial hardship and would likely soon be put out of business.

Plaintiff filed a complaint against the State of Michigan, MDE, Great Lakes, and SPARC in the Court of Claims. The complaint alleged causes of action for a violation of the Urban Cooperation Act, breach of contract, tortious interference with a contract, tortious interference with a business relationship, civil conspiracy, concert of action, silent fraud, fraudulent misrepresentation, unjust enrichment, and promissory estoppel. Plaintiff also requested preliminary and permanent injunctive relief. Great Lakes and SPARC were eventually dismissed from the lawsuit. With the dismissal of Great Lakes and SPARC, plaintiff indicated that it was also dismissing, for the purpose of the preliminary injunction hearing, the counts of tortious interference with a contract, tortious interference with a business relationship, civil conspiracy, concert of action, and unjust enrichment.

A hearing on the preliminary injunction was held over four days and at the conclusion of the testimony, the trial court granted plaintiff the preliminary injunction. The trial court found that plaintiff had met the requirements for a preliminary injunction, including a showing of irreparable harm and a likelihood to prevail on the merits of its claims. The injunction allowed Great Lakes to continue to serve the 15 original school districts that participated in the State's pilot program. Defendant filed leave to appeal and this Court entered a stay of the enforcement of the injunction.

II. STANDARD OF REVIEW

A granting of injunctive relief is within the discretion of the trial court and this Court reviews for an abuse of that discretion. *Michigan Coalition of State Employees Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). "The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisprudence and the evidence in the case." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263; 489 NW2d 211 (1992). This Court will not overturn a trial court's findings of fact unless it is convinced that it would have reached a different result. *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 661; 588 NW2d 133 (1998). Whether a nonparty's rights are impermissibly affected by an injunction is a question of law that this Court reviews de novo. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

III. ANALYSIS

A preliminary injunction is "an extraordinary remedy that is sometimes granted before a case is even decided on the merits." *Michigan Coalition of State Employee Unions, supra* at 219. The granting of a preliminary injunction "serves to preserve the status quo pending a final hearing, enabling the rights of the parties to be determined without injury to either party." *Pharmaceutical Research & Manufactures of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). In order to justify this extraordinary remedy, the moving party must show (1) a likelihood that it will succeed on the merits of the claim, (2) a danger that it will suffer irreparable harm if the injunction is not granted, (3) that the moving party will be more harmed by the failure to grant an injunction than the nonmoving party would be harmed by the granting of the injunction, and (4) that the moving party does not have an adequate legal remedy available. *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984). "'[A] real and imminent danger of irreparable injury must exist to support a grant of injunctive relief.'" *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255

Mich App 83, 106; 662 NW2d 387 (2003), quoting *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999).

Defendant argues that the injunction impermissibly affected the rights of the nonparty cooperatives, and that plaintiff did not show irreparable harm or a likelihood of success on the merits of any of its claims. We conclude that the trial court did not abuse its discretion in granting the injunction.

A. Nonparty Rights

Defendant argues that the State cannot stop the cooperatives from forming and once they are formed, they are school food authorities to which the State must provide USDA commodities. Defendant further argues that the injunction affected the cooperatives' right to obtain USDA commodities, even though they were not a party to the injunction, nor could the be parties as the Court of Claims lacked jurisdiction over the cooperatives. See *Doan v Kellogg Community College*, 80 Mich App 316, 320; 263 NW2d 357 (1977), citing MCL 691.1401(b), (c), (d) ("Certain governmental instrumentalities are never within the jurisdiction of the Court of Claims. These include: counties, cities, villages, townships and school districts."). Plaintiff argues that the injunction does not prevent the cooperatives from forming, it only prevents defendant from diverting USDA commodities from plaintiff to the cooperatives.

The injunction issued by the lower court stated:

> Defendants State of Michigan and Michigan Department of Education shall be and hereby enjoined and restrained from entering, performing, honoring, furthering or extending commodity diversion or related agreements and undertakings with GLSFC [Great Lakes], SPARC, or other cooperatives, or otherwise permitting or allowing cooperatives to provide any food commodities to any Michigan school district under any school food program administered in whole or in part by the State of Michigan, except as and to the extent expressly set forth herein until further Order of this Court.

We conclude that the injunction did not impermissibly affect the rights of the cooperatives. The cooperatives were not enjoined from forming or existing. The State was enjoined from diverting USDA commodities to the cooperatives. Defendant argues that this violated the school districts' rights, as school food authorities, to receive USDA commodities. However, the injunction does not hinder the school districts' rights to receive USDA donated commodities. The school districts are still able to receive the commodities; they just have to receive them from plaintiff. The injunction issued by the court affects some of the school districts' rights, but only by way of the State's actions. The cooperatives were not enjoined from doing anything. It was the State that was enjoined from diverting commodities to the cooperatives, without using plaintiff's services. As such, we conclude that the injunction did not impermissibly affect nonparty rights.

B. Irreparable Harm

"Generally, irreparable injury is not established by showing economic injury because such an injury can be remedied by damages at law." *Alliance for the Mentally Ill of Michigan*, *supra* at 664. Further, this Court has stated:

> A breach of the contract, by itself, does not establish that a party will suffer an irreparable injury. In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical. *Merrill Lynch, Pierce, Fenner & Smith Inc v E F Hutton & Co, Inc*, 403 F Supp 336, 343 (ED Mich 1975). Economic injuries are not irreparable because they can be remedied by damages at law. *Acorn Building Components, Inc v Local Union No 2194, UAW*, 164 Mich App 358, 366; 416 NW2d 442 (1987). A relative deterioration of competitive position does not in itself suffice to establish irreparable injury. *Merrill Lynch, supra*. [*Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998).]

This Court has found no case law in Michigan that addresses whether a business' potential insolvency is an injury that could equate with irreparable harm. Although potential insolvency is a type of economic injury, unlike straight damages for breach of a contract or loss of business, the potential insolvency and bankruptcy of plaintiff's business cannot be necessarily and easily measured and cannot be easily compensated at law. The United States Court of Appeals for the Sixth Circuit has concluded that "impending loss or financial ruin" of a plaintiff's business constitutes irreparable harm. *Performance Unlimited, Inc v Questar Publishers, Inc*, 52 F3d 1373, 1382 (CA 6 1995). The court noted that loss of business is the type of irreparable harm that an injunction serves to protect against, as further litigation would becoming "meaningless or hollow" without a preservation of the status quo. *Id.* The court recognized that generally a preliminary injunction is not appropriate when potential harm to the movant is financial. However, the court found that "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Id.*[2] If a

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[2] The court cited the following in support of this exception:

> Wright and Miller, Federal Practice and Procedure: Civil § 2948, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (threat of bankruptcy constitutes irreparable harm); *National Screen Service Crop. v. Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir.1962) (no abuse of discretion where denial of injunctive relief would result in the destruction of movant's business), *John B. Hull, Inc. v. Waterbury Petroleum*, 588 F.2d 24 (2d Cir.1978), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979) (possibility of going out of business is irreparable harm); *Tri-State Generaltion v. Shoshone River Power Inc*, 805 F.2d 351 (10th Cir.1986) (threat to trade or business viability is irreparable harm).
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> *See also Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 924 (6th Cir.1978) ("We believe the record in this case supports the decision of the district court to grant preliminary injunction. . . . [T]he plaintiff introduced proof of such severe

(continued…)

plaintiff's business becomes insolvent and ceases to exist, money damages cannot compensate the plaintiff and there is no adequate remedy at law. A judgment for the plaintiff would be "meaningless or hollow" if the purpose of the suit was an attempt to stay in business and while the case was pending, the plaintiff ceased to exist as a viable business. Therefore, we agree with the analysis of the Sixth Circuit in *Performance Unlimited* and conclude that the potential insolvency of a business could constitute irreparable harm.

We also conclude that the trial court did not abuse its discretion in concluding that plaintiff presented evidence of potential insolvency and irreparable harm if the injunction was not granted. Plaintiff's owner and president testified that the forming of the cooperatives had been devastating to plaintiff's business. He testified that plaintiff's liabilities were exceeding its assets and that he believed that plaintiff needed its business volume restored almost immediately for it to continue operating. There was also testimony that plaintiff's business volume had decreased almost 42 percent since the cooperatives were formed. This testimony was sufficient to support the trial court's finding that plaintiff would suffer irreparable harm of potential insolvency if the injunction was not granted.

Defendant argues that plaintiff cannot show irreparable harm because this Court entered a stay of the injunction and plaintiff has yet to go out of business while this appeal was pending. However, plaintiff's ability to stay in business pending appeal was not before the trial court when it made its decision. Therefore, we do not consider this when deciding whether the trial court abused its discretion in concluding that plaintiff had shown irreparable harm. *Kent County Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000), aff'd sub nom *Bryne v State*, 463 Mich 652; 624 NW2d 906 (2001) (finding that this Court's review is limited to the trial court record and enlargement of that record is not permissible on appeal).

C. Success on the Merits

We also conclude that the trial court did not abuse its discretion in finding that plaintiff would succeed on the merits of at least one of its claims. Specifically, we conclude that there was evidence to support a finding that plaintiff had a likelihood of success on its claim for promissory estoppel.[3]

(…continued)

> financial hardship that, upon finding the requisite likelihood of success, the court could reasonably conclude that delay in granting interlocutory relief would render a later judgment on the merits meaningless. Under [plaintiff's] proof he would have been completely 'wiped out' long before a final decision could be expected. The district court did not abuse its discretion. . . ."). [*Performance Unlimited, supra* at 1382-1383.]

[3] We question whether plaintiff showed a likelihood of success on the merits of its other claims. However, as plaintiff only needed to present a likelihood of success on one of its claims and we conclude that there was evidence to support a finding of a likelihood of success on the promissory estoppel claim, we affirm the granting of the preliminary injunction and do not address the other causes of action that plaintiff presented to the trial court.

The doctrine of promissory estoppel is to be applied cautiously and should only be applied "where the facts are unquestionable and the wrong to be prevented undoubted." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). The elements of a claim for promissory estoppel are (1) a promise, (2) "that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee," and that (3) the promise in fact produced reliance or forbearance such that the promise must be enforced to avoid injustice. *Id*. at 686-687. The promise must be clear and definite in nature. *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). A promise is defined as "'a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promise in understanding that a commitment has been made.'" *State Bank of Standish Co v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993) (citations omitted). A promise must be distinguished from a statement of opinion or a prediction of future events. *Id*. at 86. A vague promise will not be sufficient for promissory estoppel purposes. *Kamalnath v Marcy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992). Additionally, this Court has held that there can be no action for promissory estoppel when an oral promise expressly contradicts the language of a signed contract. *Novak*, *supra* at 687.

Plaintiff alleges a claim for promissory estoppel based on a statement in an award summary for the 2003 school year, which stated that the new contract plaintiff was entering into with the State would increase the number of recipient agencies serviced by Northern by approximately 32 percent. Similar statements were made in a letter from the State requesting that plaintiff make an oral presentation on their bid proposal. Plaintiff also submitted evidence that these statements led it to invest a significant amount of money in order to service the increase in recipient agencies. There was also evidence submitted at the hearing on the injunction that defendant did not inform plaintiff of the increasing number of school districts participating in the cooperative, nor did the State adjust the expected number of lunches that plaintiff would be providing to reflect the school districts that were participating in the cooperative program. However, the contract contained language that informed plaintiff that it was not guaranteed any specific quantities or any specific volume of business.

When reviewing the evidence submitted to the trial court, we cannot conclude that the trial court abused its discretion in finding a likelihood of success on the merits of the promissory estoppel claim. "To determine the existence and scope of a promise [this Court] look[s] to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *State Bank of Standish*, *supra* at 86. In this case, the statements to plaintiff were made in connection with discussions on plaintiff's bid and the new contract. The parties had contracted with each other in the past for this same type of service. Defendant also specifically inquired of plaintiff how plaintiff would handle this increased volume and defendant was informed of plaintiff's plans for expansion. The statement to plaintiff was clear and definite; "the new contract *will increase* the number of RAs . . . to approximately 32% of the RAs." (Emphasis added). There was also evidence that plaintiff relied on this statement when it increased its operations in order to be able to provide the requested increase in service. Defendant should have reasonably expected reliance on this promise, as defendant specifically questioned plaintiff on how it was going to handle the increase in volume and informed plaintiff that it was satisfied with plaintiff's plans for expansion. Additionally, when the contract was renewed, defendant never informed plaintiff that the number

of school districts joining the cooperatives was increasing and that meant the number of school districts that plaintiff would service was decreasing.

Although one could argue that the contract alone governed the parties' business relationship and extrinsic evidence should not be considered, we do not review this issue de novo, but we review the granting of the injunction for an abuse of discretion. *Michigan Coalition of State Employees Unions*, *supra* at 217. We conclude that, because of the contractual language, whether plaintiff showed a likelihood of success on the merits of its claims is a close question. However, a trial court's decision on a close question normally cannot constitute an abuse of discretion. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 517; 679 NW2d 106 (2004). We conclude that the trial court did not act in an arbitrary manner. *Jeffrey*, *supra* at 263. The trial court conducted a four-day hearing and issued a thorough and deliberate opinion. We, therefore, conclude that the trial court did not abuse its discretion in finding a likelihood of success on the merits of the promissory estoppel claim, as there was evidence presented at the hearing that supported plaintiff's claim. We decline to address the other issues raised by defendant, as plaintiff only had to present evidence of a likelihood of success on one of its claims for the injunction to be granted.

IV. CONCLUSION

We conclude that the trial court did not abuse its discretion in granting the preliminary injunction for plaintiff. Nonparty rights were not impermissibly affected by the injunction. There was evidence to support the trial court's decision that plaintiff made a showing of irreparable harm and a likelihood of success on the merits of at least one of plaintiff's claims. Therefore, we affirm the trial court's granting of the preliminary injunction.

Affirm.

/s/ Michael R. Smolenski
/s/ Bill Schuette